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A LETTER

ADDRESSED TO

HON. J. A. PEARCE, U. S. SENATE,

UPON

KANSAS AFFAIRS,

BY A CITIZEN OF MARYLAND.

BALTIMORE, *December* 29, 1857.

HON. JAMES ALFRED PEARCE,

United States Senate:

DEAR SIR:

The respect I entertain for you as a statesman and a man, and the friendly relations which have always existed between us, induce me to take the liberty of addressing to you some of my crude views upon the subject of Kansas affairs. Although the question now pending before Congress may be said to be one of great magnitude in principle and theory, yet in my humble judgment, in its practical bearing, it is one of very little moment. The question of the right of one government to enforce upon another, against its will, a system of laws, would seem to be a matter deserving the gravest consideration, but when the exercise of this power is accompanied with the conferring of the right in the governed to alter and amend that system at pleasure, the question is at once thereby robbed of much, if not of all, of its importance

I propose to review the leading points of the arguments of Senator Douglas in his speech in the Senate, and those of Governor Walker in his letter of resignation.

The Senator from Illinois sets out in his able speech, by assuming that an "enabling act" of Congress was necessary to make *legal* the application on the part of Kansas to be admitted into the Union. By this is meant that an act of Congress, authorising the people of Kansas to form a State Constitution was necessary, before any demand to be admitted into the Union would be regarded as legal. The opinion of the Attorney General in the case of Arkansas is cited to support this doctrine. Whether the opinion supports the doctrine or not, the doctrine itself is denied. That clause in the Constitution which confers power, or more properly which imposes a duty upon Congress, is found in the 4th Art. and sec. 3: "New States may be admitted by the Congress

into this Union." It is a well settled rule of interpretation in reference to all instruments of this character, that when the power intended to be conferred is to be exercised for the public welfare, the word *may*, in interpreting the law, should be construed *shall*, and what may appear to be a mere *discretionary power*, becomes a *ministerial duty or obligation*. In the case of Baltimore City vs. Marriott, 9 Md. Rep. 174, the doctrine is thus announced: "It is a well settled principle that when a statute confers a power upon a corporation to be exercised for the public good, the exercise of the power is not merely discretionary but imperative, and the words 'power and authority,' in such case, may be construed *duty* and *obligation*." This general principle pervades the decisions of all our State Courts, and also of England.

If it were otherwise the *important duty* imposed upon Congress to admit new States, would become a mere discretionary power to be exercised or not, as the caprice of Congress should dictate. Never could the wise framers of our government have intended such a construction to be placed upon this language. Looking, with a wisdom and foresight which were never before or since possessed by any body of men, to an extension of this republic far beyond its then existing limits, it was their design to impose, as a high obligation, upon Congress the duty of admitting into the Union as many new States as might apply for admission, provided they presented, by their constitution, "a republican form of government." Therefore in my judgment, for Congress to refuse admission to any new State, however it may have presented itself, provided it has "a republican form of government," and in its organization into a State, it violated no law of natural justice, nor no principle of republican institutions, would be to perpetrate a wrong, and to disregard a high moral obligation. Under such circumstances, a State applying for admission into the Union but demands a right, and does not sue for grace. Where beyond the Arkansas case does the Senator find authority for the necessity of "an enabling act?" If precedent makes law, and the last precedent be the controlling one, then the case of California which came into the Union without any "enabling act," should overrule the Arkansas case. The Senator admits further that States may come into the Union irregularly, that is without an enabling act, but in doing so, he insists, they are received into the family of States as *petitioners*, asking for grace, and not as *demandants* of a right: and he will no doubt assert that as *petitioners* California was admitted. However other States may have come into the

The Star has a solemn and terrible article announcing semi-officially, as Bigler would say, the mediate dissolution of the Union, in case Lempton does not pass. Not ten Southern representatives would, in that event, remain a day lonr in Congress. Those at the North who have operty, the value of which will be destroyed in e destruction of the Confederacy, are kindly arned to beware. The article is intended for the orthern Democratic market. Everybody here ughs at it.

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Union, it is a clear historical fact, that California demanded admission as a right, and did not sue for it, as a boon, and upon those grounds she was admitted.

But I do not propose to extend this point further, but will concede for the sake of argument, the position of the senator to be correct, and that an enabling act is necessary to entitle a state to claim *as a right*, admission into the Union. To what does this assumption lead? If then in the absence of this enabling act the Lecompton Constitution is a nullity, then Kansas is still *a territory*, under the control of Congress, and though every man in the territory were in favor of that constitution, and that it was a republican form of government, still there would be no legal or moral obligation resting on Congress to admit Kansas as a State, because of the absence of the enabling act, but that as an act of grace it might be admitted as an answer to the prayer of petitioners. The application for admission, we will suppose, is denied, the Constitution rejected, and consequently a territorial condition continues to exist. Congress would assume, or rather continue, control over the people. Under the power of Congress to pass laws for the territory, of which no one can doubt, what is then to prevent the passage of all the provisions, as a code of law or government, that are now to be found in this Lecompton Constitution? The senator is indignant at the idea of *forcing* upon the people a code, or system of government, under the name of a Constitution, yet his course of argument admits, that the same code or system can be put upon Kansas, in the shape of legislative enactments. The senator says we have no right by means of *a so called Constitution* to force a banking system upon the people of Kansas—nor a particular system of taxation—nor to exclude free negroes, and the like. But if we put these provisions in the shape of acts of Congress for the government of the territory, then there would be no legal objection to them. The people would revolt, he says, if a Constitution is imposed upon them against their will, but it is presumed they would quietly submit, if the same legal enactments were put upon them under the form of simple acts of Congress. Let us inquire for a moment into the difference of these two forms of law, and see why the one should provoke resistance and bloodshed, while the other should command submission and peace? This iron law, as it is regarded by the senator, the Constitution, whatever obnoxious features there may be in it, has this one peculiarity—it places the people, whom it intends to govern, forever free from the control of the high power of Congress—puts them under

their own mastery, one of the attributes of which is, the right to alter and amend their organic law at pleasure. Whatever evils therefore, which the people might discover in their system of government, as prescribed by the Constitution, the same instrument, in recognizing them to be an independent State, recognizes also their power and right to change their form of government, if not satisfied with it.

On the other hand, let us look at the system of *congressional government*, to which the senator from Illinois would consign the people of Kansas, as a protection against the injustice and oppression of this Constitution. The senator's argument, as I have endeavored to show, makes the admission of a State to depend upon the discretion of Congress under a *power*, and not under *an obligation*, expressly imposed, and that without an enabling act, which may or may not be granted, at the pleasure of Congress, a people may be kept in a territorial condition through all time. In this way oppressive legislation, which when embodied in *a Constitution*, might be gotten rid of by the people at their own pleasure, may become a perpetual burden under an act of Congress. Suppose under the theory of the late governor of Kansas, and to which I will refer more at length hereafter, the sovereign power of Kansas, which, he says, while it remains a territory, rests with the *people* of the several States, was to exercise itself towards Kansas by the enactment, by Congress, of a law which was odious and oppressive, and to which every body in Kansas was opposed—could the people of Kansas by any power they may possess, repeal the law? By no means. They would even be worse off, than if they had had an irrevocable Constitution, (if such a thing was possible,) imposed upon them by a minority of their own people. They would be oppressed by a law imposed upon them by strangers, which even a minority, as in the other case, of their people, did not approve.

If the position be correctly attributed to the senator, that the *power* in a territory to form a Constitution, cannot be exercised as a *right*, but is only *permissive* from Congress; and the deduction be correct which is drawn from that principle, namely, that until such permission is given, the people of Kansas remain under the legislative control of Congress, then in this view, while, it might be conceded that Congress had no power to force upon the people, a Constitution, *eo nomine*, yet it would inevitably follow, as has been shown, that all the legal provisions of that Constitution might be imposed upon the people in the shape of simple

legislative enactments, except such as might contravene the supreme law, the Constitution of the United States, and in this class the subject of slavery would fall, because Congress has no control over the subject. This being true, the provisions of the so called Constitution would become the subject of amendment and addition by Congress. Why not then add to it *an enabling act*, (though not admitted to be necessary,) providing for the immediate submission of the question to the people in due form whether they will have a new form of government. In other words, put the State in motion under this Constitution, coupled with a provision for the submission, to the people, of the question of a change of government, by calling a new convention; in the mean time requiring the people to live under the present Constitution or code, by virtue of the power conferred by the Constitution on Congress to legislate for the territories. In other words, let it be quasi a State for the purpose of organizing itself into a permanent State Government, to be approved by the people, while, until this is accomplished, it must remain under the present Constitution as a law of Congress governing a territory.

It may be said that this course of reasoning would lead to the conclusions adopted by the Republicans of the North, to wit: that if Congress under the general power "to make all needful rules and regulations respecting the territory belonging to the United States," could pass laws, in regard to banks, taxation, free negroes and the like, why could not Congress exclude slavery? The answer is to be found in the 4th Art. 2d and 3rd sections of the Constitution, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States;" and again, "nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State." This question leads us to a point which may be considered more fully hereafter, namely, as to the *source of power*, by which the slavery question is regulated in the territories, before their formation into States; and this point involves further, the consideration of the question of *territorial sovereignty*, as presented by the letter of resignation of Governor Walker, which I propose now to consider, I fear, imperfectly.

The positions of the Governor upon the question of "sovereignty," appear to be untenable in many particulars.

In the first place if he intended to assert without qualification, as it seems he does, that no State constitution could have any validity unless submitted and approved by the people, he is clearly

in error. If a people, in their sovereign capacity, were to appoint delegates to a convention, or were to confer power upon any other agent, to form a constitution, whether through the Legislature or otherwise, with unrestricted powers, then clearly the constitution thus made, need not be submitted for further ratification. The authority in such case embraced the power in the convention to bind the people; or more properly, it would not be the convention binding the people, but the people binding themselves, in so far as they had tacitly agreed that any constitution should be the supreme law, which their agents might adopt: and this would perhaps embrace every power, except that of making the constitution irrevocable, which the people could not do, for the reason that a present generation cannot bind those who are to come after them. But on the contrary, the people would not be bound by any constitution, if they had attached a condition, either express or implied, to the authority conferred upon a convention or other agent, that any constitution they might frame must be submitted for ratification before it should be valid. The people of a State are not more sovereign over their government, than an individual is over his private property to which he has an unconditional title. If the latter were to delegate to an agent power to sell his farm, for example, it cannot be denied that the act of the agent would bind his principal, and a sale thus made would be obligatory. But, if on the other hand, the authority to sell was coupled with a condition that the sale to be valid should be submitted to the principal for his ratification, the case would be different.

The Governor seems also to have fallen into an error upon the subject of "sovereignty." He takes two grounds: first, that "sovereignty is inalienable, indivisible, a unit incapable of partition, and that it cannot be delegated in whole or in part:" and secondly, he assumes, that all power over the territories not conferred upon Congress by the several States through the constitution, "are dormant or reserved powers, belonging, in common territory, to all the States, as co-equal, joint tenants thereof of that highest political power called sovereignty." And again the Governor repeats this proposition, in another part of his letter, when he says, "now as no one who, with me, denies federal or *territorial sovereignty*, will contend that a territorial legislature is sovereign," &c.

Let us inquire where these two positions will carry us, if followed to their legitimate and practical results? Under the application of these two principles, when, and in what manner did sovereignty first exist in Kansas? If the sovereign power over

the territories is in the several States, and if that sovereign power cannot be delegated or transferred or granted, and is indivisible, we must look elsewhere for the date and origin of sovereignty in Kansas, than from the several States. But we find the sovereignty over Kansas deposited in the several States, as "joint tenants," according to the Governor, and it would indeed seem almost impossible by his reasoning ever to change this condition of things. Sovereignty over Kansas, when once recognized in the people of Kansas either as a State or territory, cannot at the same time continue to exist in the States, but having been once admitted to have been in the States and afterwards in Kansas proper, the question would naturally arise, how did it get there without violating the theory of the Governor that sovereignty is not transferable, cannot be delegated or granted, is indivisible? The conclusion inevitably to be drawn from the two positions is, that sovereignty having been once in the several States, must forever continue there, or it must be *transferred or delegated*, to the people of Kansas, in some way, or by some process.

But this position may be denied, and it may be said that sovereignty is inherent in the people of Kansas, created with them, and derived from no other source. How does this theory help the positions of the Governor? The question still arises, at what period of time and in what manner did sovereignty first exist? Was it in the Indians? or was it lodged in the first white man that settled upon this territory? or, did it require a certain number of free white citizens to develope sovereignty, and if so, how many? In either case what becomes of the theory of "the highest political power called sovereignty" being in the several States? If sovereignty is inherent in the people of Kansas then, from the moment the first white settler took up his abode in Kansas, sovereignty ceased to exist in the States, because it cannot have two abiding places at the same time. How could such a notion comport with the power in Congress to create territorial governments, and how much less would it comport with the right claimed for Congress by the Senator of Illinois, to keep the people of a territory under congressional government as long as deemed expedient? Or how does it comport with the power in Congress to manage and dispose of the public lands, a power of all others which would seem to be derived from sovereignty? A power to legislate derived from any other source than sovereignty itself, cannot exist consistently with republican institutions. Therefore, the right which Congress claims, and which is recognized upon all hands,

to legislate for the territories, must be derived from sovereign power, and as all the powers of Congress are derived from the several States, it follows that the States are sovereign in regard to the territories. This is the position taken by ex-governor Walker, and it must be the true one. If it were otherwise, and the people of Kansas in their inchoate or territorial condition were sovereign, what right would Congress have to restrain them from forming themselves into an independent State at any moment? They might keep them out of the Union, it is true, but further than that they would have no power, not even to prevent them from forming themselves into a monarchy or despotism. If the sovereignty of Utah were in her people, where is the power in Congress to override it, and assume to dictate laws to that misguided territory? Where is the power of Congress to control and dispose of the public lands except the power come from sovereignty?

The error, it is respectfully suggested, into which the Governor has fallen, is denying to sovereignty the power to *confer, grant* or *transfer* its supreme attributes. He says, sovereignty can "grant powers, but not sovereign powers, otherwise it might extinguish itself by making the creature of its will the equal or superior of its creator." This doctrine carries contradiction upon its face. Sovereignty implies supreme power, yet while this supreme power or omnipotence is recognized in one part of the sentence, it is denied in the other, because it withholds one of the attributes of omnipotence, namely, the power of *conferring* supreme power. The doctrine is contrary to the great Christian theory under which we all live, and which constitutes our accepted faith. God is omnipotent and therefore sovereign. "All things were made by him." The Saviour was his "true and only begotten Son," "who being in the form of God, thought it not robbery to be equal with God." Indeed only in this august source is to be found real sovereignty, because only here exists unlimited omnipotence. We learn from this great source that one of the attributes of sovereignty, is that of being able to confer sovereign power. Sovereignty may be defined to be unlimited power, over the particular subject matter to which it relates. For example, the unconditional owner of any particular property may be said to be sovereign in reference to that property. Those with whom are deposited the power to create, alter, and abolish government, are sovereign over that particular subject matter. As therefore a man can transfer or grant to another his sovereign power over his property, so may

a people divest themselves of their sovereign rights over their government, or over any particular part of it. This is one of the highest attributes of sovereignty.

How and where did our thirteen original States derive their sovereignty? Surely, while they were colonies of Great Britain they were not then independent sovereignties. Nor did the mere act of rebellion make them so—nor did the declaration of independence. Suppose our fathers had failed in their struggle for independence, we would have found ourselves where we began, mere dependent colonies upon Great Britain. No sovereign power was thus conferred upon us. Then where did our sovereignty come from? It resulted from the act of the recognition of our independence by the mother country. It does not follow however that sovereignty would not have resulted from the sure establishment of our independence, and its recognition by other nations, whether formally recognized or not by England. Such was the result in the case of Texas, for I believe Mexico never did recognize its independence, not even after it was admitted into this Union.

It remains then but to state the conclusions to which the premises laid down would lead. In the first place they establish that sovereignty over the territories, is deposited in the several States of this Union. In this conclusion the Governor concurs. Secondly, it follows, that the sovereignty of any state or country cannot exist at the same time in two places or sources; and thirdly, that sovereignty can only get into Kansas by being transferred, or conferred, or granted, or segregated from the States, the original and first source of the power. Hence it further follows, that the constitution of the United States, which is "an act of sovereignty," on the part of the people of the *several States*, confers upon Congress the power, or imposes the duty, of admitting new States, and in doing so, the sovereign power of this nation designed, and did actually empower Congress, to confer upon new States all the sovereign rights, attributes and immunities which belonged to the first source of power, the people of the original States, except those which are reserved.

If this theory be not true how would the question of the control of the public lands stand? How, upon any other theory could the general government claim the ownership of the public lands? If the people of Kansas even as a State, are sovereign, independent of any vitality derived from the several States, by what authority does Congress control the lands within its limits? It has

been already said, and will not be denied, that the conferring of a power to control the lands of a State, is one of the highest acts of sovereignty, yet it will not be pretended that this power as exercised by Congress, was conferred by the territory or new State. The fact is the reverse; it has been withheld from the people of the territory, as well as from the new States, by the general government.

Many errors it would seem, has grown out of this question, from a misconception of the true nature and essence of sovereignty. What is it? It cannot be a mere abstract *right*, unaccompanied with *power* to exercise or enjoy that right. Sovereignty, if it cannot exist without right, (which is not affirmed,) surely cannot exist without power, though it has the right. Power is one of the inseparable attributes of sovereignty. The Governor in parts of his letter, has used the terms *sovereignty* and *power* as synonymous, and to a certain extent properly. Hence it may be, that an oppressed people, as in the case of our own first colonies, might possess the divine right to govern themselves, yet, they could be hardly regarded as a sovereign nation or state without the power to exercise or enforce that right. So in the case of the territories; as we are not instituting any inquiry about the abstract *right* of the people to govern themselves, but are endeavoring to ascertain when and how sovereignty, *de facto*, is to develope itself in Kansas, we must determine the point of time, and the particular manner in which *right and might* became joined, in the people of Kansas, so as to produce that "highest political power called sovereignty." *Supreme power*, connected with *right*, would unquestionably constitute sovereignty. Whatever may be the *rights* of the people of a territory, they cannot be regarded as an *independent* people as long as they are under the control of Congress. Until Congress surrenders its control over a territory, whether that control is rightfully exercised or not, the people cannot be said to be sovereign; and it matters not how you designate this surrender on the part of Congress, whether it is called conferring, delegating or dividing sovereignty, the result is the same. *The union* of *power with the right in the people*, to govern themselves, consummates sovereignty in them. Hence it is, that the people of a territory are sovereign only from the moment they are recognized as a State, and the effect of that recognition consists exclusively, in conferring or surrendering by Congress, as the delegated agent of sovereignty in the people of the States, the power or authority to alter and amend their organic law at will.

It would follow that in conferring or surrendering this great power to the people of a territory, Congress might simultaneously connect with it any legislative enactment which it could before legitimately enforce upon the territory, (they being one and the same exercise of power,) and until the people, under the great power to remodel their form of government, thought proper to throw these territorial laws off, they would continue in full force. Therefore, in being *recognized as a State*, Kansas becomes sovereign and not before, but she must exercise her sovereign powers in remodeling her organic law, before she can shake off completely her territorial condition, and her obligation to abide the laws of Congress. Until this is done, all the provisions of the Lecompton Constitution may be put upon the people of Kansas, and they will continue in force until abrogated by an act of sovereign power on the part of Kansas, in her character as a State.

You will observe, in my efforts to discuss this subject, I have not taken a personal or partizan view of it, but have endeavored to confine myself exclusively to the principles involved in the controversy.